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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 463

LYDON WEBBER, ET AL., PETITIONERS

v.

TURNER & BLANCHARD, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE UNITED STATES MARSHAL IN OPPOSITION [1]

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a) is reported at 1963 AMC 1447, but has not yet been reported in the federal reporter.[2] The memorandum decision of the district court (Pet. App. 21a-22a) is reported at 1963 AMC 1448.

[1] The United States is a party to this litigation in its capacity as a cargo owner. The United States Marshal, although not a party in the court of appeals, incurred substantial liabilities pursuant to the mandate of the court of appeals and district court orders, and would therefore be adversely affected by the grant of certiorari. See, *infra*, pp. 5–6.

[2] "Pet. App." refers to petitioner's appendix, which is attached to the petition for a writ of certiorari.

JURISDICTION

The judgment of the court of appeals, affirming the order of the district court, was entered on June 28, 1963. The petition for a writ of certiorari was filed on September 11, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court exceeded its discretion in holding that the cost of discharging cargo from an attached vessel to facilitate its sale was a marshal's administrative expense.

STATEMENT

On December, 1962 (Pet. 4), while carrying some $3,000,000 worth of cargo owned by more than 200 different consignees, the SS EMILIA was seized and taken into the custody of the district court pursuant to a libel for personal injury. Soon thereafter approximately 30 other libels were filed. Petitioners' libels, which were filed on February 26, 1963,[3] sought wages, contributions to union vacation and welfare funds, and maintenance and cure. With one exception, the wage claims derive from December 14, 1962, until the crew was discharged in March 1963, that is, the period of time in which the vessel was in the custody of the court and petitioners were engaged as its seamen.[4]

[3] Petitioners filed three libels on February 26, 1963, one for wages and two seeking approximately $15,300 in employee contributions to union funds. Two additional libels by "trustees" seeking approximately $4,500 for maintenance and cure, were filed on May 17 and May 20, 1963.

[4] Although the amended libel of petitioners Webber *et al.* seeks approximately $66,000, their wage claims, excluding asserted penalties and fringe benefits, do not exceed $10,000 to

Only one of the petitioners made an express claim for unpaid wages accruing prior to the arrest of the vessel.[5]

On February 28, 1963, Turner & Blanchard, Inc., the dock-owner, filed a libel in the United States District Court for the Eastern District of New York for wharfage and other services rendered the EMILIA while in *custodia legis*. On or about April 24, 1963 (Pet. 6), Turner & Blanchard, Inc., petitioned the court for an order removing the EMILIA from its dock, where she blocked nearly one-third of its facilities, or authorizing her judicial sale (Pet. App. 3a).[6] After a hearing, on May 13, 1963, the court authorized sale of the vessel (Pet. 7). On the initiative of proctors for the first preferred mortgagee, the court held further hearings May 20–21[7] to dis-

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$12,000. The payroll records of the vessel's owner reveal that all of the petitioners have in fact received all of the claimed wages, from proceeds of a bank letter of credit to A. H. Bull, for the period of time in which the vessel was in the custody of the court.

[5] Examination of the payroll records of A. H. Bull, the vessel's owner, discloses that the petitioners, and all other seamen of the EMILIA, were paid in full to and including December 11, 1962, the day preceding the arrest of the vessel (with the possible exception of petitioner Fravel, who has a claim for wages accrued prior to November 28 in the amount of $149.66).

[6] Judge Mishler, rather than Judge Rosling, was hearing motions at this time.

[7] In the notification of interested parties to appear May 20, 1963, the proctor for petitioners Webber, *et al.*, was inadvertently omitted. He appeared, however, at the May 21, 1963, hearing (Pet. 8–9).

cuss such matters as the impracticality of continuing the effort to sell the vessel with cargo aboard, the possibility of obtaining stevedores to discharge the cargo, whether the expense of unloading should be considered a marshal's administrative expense, and the minimum upset price at the marshal's sale. By order of May 21, 1963 (Pet. App. 14a), the court authorized sale of the vessel, free of cargo, at a minimum price of $250,000. Finding that the presence of the cargo had an adverse effect on the sale of the vessel, "to the detriment of all parties who have an interest, claim or lien in the vessel," the court ruled that the costs of discharging the cargo should be paid out of the proceeds of the sale as a marshal's expense (Pet. App. 21a–22a).

Subsequently, the EMILIA's owner, the A. H. Bull Company, and other corporations controlled by Manuel Kulukundis filed petitions in bankruptcy under Chapter X of the Bankruptcy Act, which are currently pending in the United States District Court for the Southern District of New York (Pet. 9). After extended argument, Judge Croake excluded the EMILIA from a stay of sale of Kulukundis vessels. On June 4, 1963, the EMILIA, with cargo aboard, was offered for sale at public auction, title to pass after removal of the cargo. No bids were received (Pet. 10, 11).

Also on June 4, 1963, petitioners and others appealed from the portion of the court's order authorizing payment of cargo removal costs from the proceeds of the sale (Pet. 11). On June 28, 1963, the United

States Court of Appeals for the Second Circuit affirmed the order *per curiam* (Pet. App. 1a) on authority of *New York Dock Co.* v. *SS Poznan*, 274 U.S. 117, and directed the district court to proceed with all reasonable dispatch. Petitioners neither petitioned for a stay or recall of the mandate, nor manifested any intention of seeking certiorari. On July 3, 1963, the district court, on notice to all parties, including petitioners, and without objection from any of them, entered an order authorizing and directing the marshal to "effect the discharge of the said cargo" and that the "cost of unloading the cargo shall be a Marshal's expense of the sale of said vessel to be paid out of the proceeds of the sale of the vessel." As instructed, the marshal entered into an agreement with the low bidder, International Terminal Operator Company, and the cargo was unloaded. On July 30, 1963 (Pet. 11), the vessel was sold to the sole bidder for $250,000, and on August 1, 1963 (Pet. 12), the district court confirmed the sale.

On August 2, 1963, the United States Marshal moved for an order directing the court to turn over to him, from the proceeds of the EMILIA, the sum of $192,176.62 to pay all[*] of his administrative ex-

[*] The wharfinger, Turner & Blanchard, has claimed $105,723.39 (Pet. 15) for wharfage, which, as a marshal's administrative expense, would also have priority over the claims of the maritime lienors. *New York Dock Co.* v. *SS Poznan*, 274 U.S. 117. That claim appears to be excessive; a reasonable wharfage fee should not exceed $40,000. Accordingly, since the fund consists of $250,000, it is entirely possible that the petitioners' priority claims will be paid regardless of this Court's action in the matter. In any event, there appear to be insufficient funds to pay the unions' other

penses, including an expense of $181,000 incurred in removing the cargo (Pet. App. 17a).[9] At the hearing on this motion on August 7, 1963, petitioners for the first time indicated their intention to seek certiorari from the Second Circuit's decision of June 28, 1963, affirming the district court's order of May 21, 1963. On August 7, 1963, the district court granted the motion to turn the proceeds over to the marshal, but stayed the order for two days in order to permit petitioners to ask the Second Circuit for a further stay. That same day, petitioners moved the court of appeals for a stay of the district court's order and for a recall and stay of the court of appeals mandate of June 28, 1963. On August 8, 1963, the Second Circuit denied the motion, but gave petitioners until August 14, 1963, to obtain a stay from this Court. On August 23, 1963, Mr. Justice Harlan granted a stay pending the filing of a petition for certiorari on or before September 12, 1963.

ARGUMENT

1. This case involves nothing more than the application of a settled principle to the particular circumstances disclosed by the record. In *New York*

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claims (which do not constitute liens), regardless of this Court's decision. In the same situation are the claims of the intervening petitioner, Maritime Food Corporation, whose libel for supplies furnished pursuant to 46 U.S.C. 971 *et seq.* falls in the Court's recognized Maritime lien category (Pet. 30-31).

[9] Rule 26(b) of the Admiralty Rules for the United States District Courts for the Southern and Eastern Districts of New York.

Dock Company v. *SS Poznan*, 274 U.S. 117, the Court laid down the rule that expenditures which inure to the benefit of the lienors of an attached vessel by helping create or preserve the fund available for distribution should be treated as an expense of administration and charged against the proceeds of the sale of the vessel before satisfaction of the libellant's claims. In *The Poznan*, certain wharfage costs were thus given priority as an "expense of justice." Similarly, in the instant case, the district court found that "the presence of cargo aboard has an adverse effect on the sale to the detriment of all parties who have an interest, claim or lien in the vessel," and, applying the rule of *The Poznan*, held that the costs of discharging the EMILIA should be treated as a marshal's expense (Pet. App. 2a, 21a–22a). Petitioners do not challenge the principle applied by the courts below[1] but contend merely

[1] Application of the *Poznan* principle to outlays benefiting an attached vessel has not been challenged in this Court since that decision in 1927. It has been followed by many lower courts in allowing wharfage as an administrative expense. *E.g.*, *Moore* v. *United States*, 302 F. 2d 918 (C.A.D.C.); *Moon Engineering Company, Inc.* v. *The S.S. Valiant Power*, 193 F. Supp. 460 (E.D. Va.); *Murray* v. *The Meteor*, 83 F. Supp. 212 (E.D.N.Y.); *The Herbert L. Rawding*, 55 F. Supp. 156 (E.D. S. Car.). The *Poznan* principle has also justified preferential payment of claims for wages of seamen requested by the marshal to stay aboard an attached vessel, *The Pacific Hemlock* v. *Hemlock SS. Corp.*, 3 F. Supp. 305 (W.D. Wash.); for loans made to continue the operation of an attached vessel, *United States* v. *The Audrey II*, 185 F. Supp. 777 (N.D. Cal.); and cf. for insurance covering an attached vessel, *The Herbert L. Rawding*, 55 F. Supp. 165, 166 (E.D. S. Car.).

that the costs of unloading did not in fact inure to the common benefit of all the lienors (Pet. 18–20). That purely factual question is plainly unworthy of certiorari.[11]

Moreover, the record amply supports the disputed finding. Some 8,500 tons of cargo owned by more than 200 consignees never left the port of embarkation. A substantial part of the cargo, which was placed on board the EMILIA more than five months before the vessel was offered for sale, consisted of perishable items.[12] To remove individual portions on a piecemeal basis was impractical for it would have entailed extensive unloading and shoring up of surrounding cargo, with an appreciable risk of damage. Prospective purchasers of the vessel were presumably unwilling to deliver the cargo because of the high probability that much of it had either deteriorated or been replaced by the shippers in the interim. Nor would they have been prepared to take responsibility for unloading the cargo; for even had it been clear, as it was not, that the costs of unloading could have been recovered from the cargo owners, potential purchasers were understandably reluctant to buy more

[11] This Court does not "review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co., Inc.* v. *Linde Air Products Co.*, 336 U.S. 271, 275; see, *e.g.*, *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147; *The Germanic*, 196 U.S. 589.

[12] The cargo included 2,650 tons of bagged wheat, most of which was close to the point of spoilage at the time the cargo was discharged. It also included frozen and chilled foodstuffs, much of which had spoiled.

than 200 lawsuits along with the vessel. In these circumstances the court properly found that the cargo was an impediment to the sale of the vessel (Pet. App. 21a). The accuracy of that finding was confirmed by later events. For, whereas there were no bidders when the EMILIA, with the cargo aboard, was offered for sale on June 4 at a minimum price of $250,000, the same offer was quickly accepted a few weeks later after the cargo had been removed (Pet. 11–12).

The courts below did not, as petitioners imply (Pet. 30), lay down a general rule that the costs of unloading a vessel after arrest are always or even usually a marshal's expense. They held merely that since, in the special circumstances of this case, the discharge of the cargo removed an important obstacle to the sale of the vessel (Pet. App. 20a, 21a), the costs of unloading should be borne by all of the lienors. Such a decision manifestly does not have the far-reaching importance claimed for it by petitioners.

2. Petitioners concede that the decision below is not in conflict with that of any other court of appeals, but predict that such a conflict will arise in the future (Pet. 34–35). The short answer, of course, is that the conflict can be resolved if and when it arises. Moreover, four unreported orders (Pet. 23a–36a, 40a–41a) placing the costs of discharging a libeled vessel upon cargo owners in the particular circumstances do not constitute a "long-established' maritime

custom, as petitioners maintain.[13] The only reported decision they cite is *The St. Paul*, 271 Fed. 265 (C.A. 2), a pre-*Poznan* decision of the Second Circuit in which the costs of discharging cargo were not in issue. Thus, there is no basis for petitioners' prediction of an impending conflict.

Petitioners also anticipate the disruption of the established system of priority for payment of maritime liens from an inadequate fund. The thrust of this Court's decision in *Poznan*, however, is that expenditures sanctioned by the court for the benefit of a vessel in *custodia legis* are not considered maritime liens which must compete with other liens for payment. Rather, their priority of payment is founded upon general equitable doctrines concerning the preservation of a *res* by the court.

3. An additional consideration militates against the grant of certiorari. In contracting for the services of a stevedore to unload the ship, the marshal was merely carrying out the July 3 order of the district court, which directed him to "effect the discharge of the said cargo as soon as practicable." That order, in turn, gave effect to the urgent mandate of the court of appeals issued June 28, which commanded the district court to "proceed with all reason-

[13] Nor does *The Orion* (Pet. App. 37a–39a) establish any such hallowed practice in English Admiralty Law. Cargo owners there contended, *but could not establish*, that removal of cargo from a stranded vessel contributed to its salvage, thereby becoming an expense of arrest.

able and feasible dispatch" (Pet. 2a). Petitioners stood by silently and permitted the marshal to incur these liabilities, to unload the EMILIA, and to sell the vessel. They made no attempt to stay or recall the mandate of either court at the time it issued. It was not until the proceeds of the sale were safely in the registry of the court that petitioners for the first time disclosed their purpose to seek certiorari; only then did they move for a stay of the district court's order—not to prevent the marshal from making the expenditure, but to prevent his reimbursement from the fund held by the court. Petitioners maintain that they derived no benefit from the discharge of the cargo. If that be true, it was all the more incumbent upon them, as a matter of equity, to obtain a postponement of the unloading, or at least to reveal their intention to seek review, so that the marshal might have been spared the risk of having to pursue more than 200 cargo owners—most of them not amenable to suit in this country—in order to make himself whole. Having failed to take such action, petitioner should not be heard at this late date to deny that the expenses incurred by the marshal were "marshal's expenses."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER, 1963.